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No. 84-1908

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ONEIDA INDIAN NATION OF WISCONSIN,
Petitioner,

v.

HOUDENOSAUNEE and
ONEIDA OF THE THAMES BAND,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS HOUDENOSAUNEE AND ONEIDA OF THE THAMES BAND IN OPPOSITION

Robert T. Coulter
Counsel of Record
Curtis G. Berkey
Indian Law Resource Center
601 E. Street, S.E.
Washington, D.C. 20003
(202) 547-2800

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Question Presented

Whether an order disqualifying counsel in a civil case on grounds of conflict of interest is subject to interlocutory appeal.

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ONEIDA INDIAN NATION OF WISCONSIN,

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On Petition for Writ of Certiorari
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The petition for certiorari correctly states the citations for the opinion below, this Court's jurisdiction and the statute involved.

Statement of the Case

The petition asks this Court to take the extraordinary step of reviewing a decision of the Court of Appeals on disqualification of counsel after the completion of proceedings in the District Court held pursuant to the Court of Appeals' remand. Pursuant to the Court of Appeals' mandate, the District Court conducted an evidentiary hearing on May 21, 1985, and announced its decision to vacate the earlier order disqualifying counsel. The District Court proceedings ended a two-year effort by the Oneida of the Thames Band to be represented by counsel of its choice.

In May, 1983, the Oneida of the Thames Band discharged its counsel, who also represents the Oneida Indian Nation of Wisconsin, and retained the same counsel who represents the Houdenosaunee or Six Nations Iroquois Confederacy. The Thames Band had decided to join with the Houdenosaunee in asserting its

interest in the claim, and it subsequently amended its complaint to reflect that unity of interest. The District Court, however, granted a motion by the Oneida Indian Nation of Wisconsin to disqualify the Band's new counsel.

The Court of Appeals held it had jurisdiction over the appeal, noting that the issue had been settled by a prior decision in that circuit. Interco Systems, Inc. v. Omni Corporate Services, Inc., 733 F.2d 253 (2d Cir. 1984). On the merits, the court held that there was no "inevitable conflict" between the interests of the Thames Band and the Houdenosaunee and that, in any event, joint representation is allowed if both parties consent after full disclosure of the potential risks of such representation. 757 F.2d at 22. The Court of Appeals ordered the District Court to determine at an evidentiary hearing whether each client understood the potentially adverse nature of the claims and

nonetheless preferred joint representation. 757 F.2d at 22.

Petitioner failed to move to stay the mandate, which issued in due course after the petition for rehearing was denied. Pursuant to the mandate, the District Court held an evidentiary hearing on May 21, 1985. Three witnesses testified on behalf of the Oneida of the Thames Band and the Houdenosaunee about their consent to joint representation. After considering the testimony and documentary evidence, the District Court found that the clients had knowledge of the potentially adverse nature of the claims and nonetheless preferred joint representation. On May 28, 1985, the District Court entered an order vacating its earlier disqualification order and granting the motion to withdraw of the Thames Band's interim counsel. The files in the case have been turned over, and the undersigned counsel have resumed representing

the Band in all respects. A further motion in the Court of Appeals by the Oneida Indian Nation of Wisconsin to recall the mandate and vacate the District Court Proceedings was denied on May 29, 1985.

Reasons For Denying The Writ

I. REVIEW WOULD SERVE NO USEFUL PURPOSE

The merits of the appeal have been decided, the issue of disqualification was remanded, and the District Court has vacated the disqualification order. The client's files which had been withheld from new counsel have been turned over. The case is proceeding to briefing of motions to dismiss with the Houdenosaunee and the Oneida of the Thames Band jointly represented. Under the circumstances, review by this Court serves no purpose other than to again disrupt a case which is at last proceeding in an orderly and

expeditious manner.

Petitioner hopes that this Court will decide in Koller v. Richardson-Merrell, No. 84-127, cert. granted 53 U.S.L.W. 3284 (Oct. 15, 1984) that disqualification orders in civil cases are not immediately appealable and that such a rule would be applied retroactively in this case. But even if this Court were to decide in Koller that such orders are no longer immediately appealable, there would be no reason to apply such a rule to a case where the appeal has already been decided, the mandate has issued, and the Court of Appeals' decision has been carried out and completely implemented by the District Court and the parties.

Review would not promote the interest of judicial economy. The application of a new rule (should one be adopted) barring interlocutory appeals of disqualification orders would serve no purpose in this case since the

merits have already been decided. The interests which might favor such a rule clearly do not apply here. For example, the policies of discouraging piecemeal appeals and avoiding undue delays would not be served since the appeal is completed and the District Court has already implemented the Court of Appeals' decision.

The fact that the Court of Appeals did not defer decision until after Koller was decided is not a sufficient reason to review this case. The Court of Appeals considered arguments about its jurisdiction in light of Koller on four separate occasions. Each time, it concluded that the law in the circuit was clear and that jurisdiction existed. Its jurisidction was not placed in doubt by the pendency of Koller. This case involves nothing more than the straightforward application of well-established law.

The petitition should be denied.

Respectfully submitted,

Robert T. Coulter
Counsel of Record

Curtis G. Berkey
Indian Law Resource Center
601 E Street, S.E.
Washington, D.C. 20003
(202)547-2800

Attorneys for the
Respondents